

83-1128

No. —

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

ALEXANDER L. STEVAS,  
CLERK

MARY LOUISE SEAY, a/k/a  
MARY LOUISE DERRINGER,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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January 9, 1984

### **QUESTIONS PRESENTED**

1. Whether the evidence of false statements about, and knowing acceptance of widow's benefits after, remarriage by common law was insufficient to establish any offense, particularly where there was admittedly a reasonable interpretation of the questions, as applying only to ceremonial marriages, for which Petitioner's answers were truthful and all other Courts of Appeals have held such circumstances insufficient to prove an offense.
2. Whether Petitioner's conviction was obtained in violation of the fair notice requirements of Due Process of Law, where the definition of common law marriage is too vague to advise parties reliably whether their conduct constitutes a marriage, and where the government forms at issue emphasize ceremonial marriages to the apparent exclusion of all other relations.

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UNITED STATES OF AMERICA,  
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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-styled case.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 718 F. 2d 1279 (1983), and is appended hereto at 1a, Appendix A. The United States District Court for the District of South Carolina issued no opinion, but entered judgment on a jury verdict of conviction.

**JURISDICTION**

The opinion of the United States Court of Appeals for the Fourth Circuit was filed on October 11, 1983. By Order of the Chief Justice of the United States, filed December 5, 1983, the time for filing this petition was

extended to and through January 9, 1984. A copy of this Order is appended hereto at 30a, Appendix B. This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The relevant provisions of the United States Constitution and of the United States Code are set forth in Appendix C, *infra*, 26a.

#### **STATEMENT OF THE CASE**

Petitioner, a grandmother now 62 years of age, was indicted and convicted on one count under 18 U.S.C. § 1921 of knowingly accepting widow's compensation benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101 *et seq.*, after she assertedly entered a common law marriage, and on three counts under 18 U.S.C. § 1001 of making false statements in 1977, 1978, and 1980, to the Department of Labor, on "Continuation of Compensation" forms, that she had not remarried.<sup>1</sup>

The dissenting judge below concluded that this criminal prosecution was inappropriate, 16a, 718 F.2d at 1287:

"At the most, the record discloses a civil controversy between the government and the defendant over her entitlement to a pension. Apparently this is the initial prosecution for fraud against a soldier's widow who has not disclosed her common law marriage."

Petitioner, Mary Louise Derringer, prosecuted as Mary Louise Seay, was married in 1941 to Edward E. Derringer. They had four children. Mr. Derringer died in 1950, and Petitioner applied for survivor's benefits for herself and her children under the F.E.C.A. She was

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<sup>1</sup> These statutes are set forth in the Appendix at pages 28a-29a.

qualified, and she received these benefits. In addition to completing routine forms issued by the Department of Labor, Petitioner, in March, 1962, met with an employee of that agency, who prepared, for her signature, a handwritten statement that she had not remarried or entered a common law marriage.<sup>2</sup>

Petitioner promptly and accurately reported to the Department of Labor when each of her four children ceased to be eligible for survivor's benefits. As required, she completed "Continuation of Compensation" forms, which, she testified, she considered to have reference to ceremonial marriages. She also had received a form in 1966 that advised her of her right to a lump-sum payment upon remarriage, which form she also understood to apply to a ceremonial marriage.

In December, 1962, Petitioner and her children moved into the home of Coke Seay, a long-time family friend who had been widowed three years earlier. Petitioner and Mr. Seay resided together for eighteen years, but never had a marriage ceremony, and both testified that they never agreed to be married, as required by the common law of South Carolina. Petitioner and Mr. Seay had sexual relations until 1970, when Mr. Seay became impotent. In most of their relations with the community, they were identified as Mr. Seay and Mrs. Derringer: Petitioner kept all her bank accounts and finances separately, in the name of Derringer; the parties were identified as Mr. Seay and Mrs. Derringer on a joint bank account and a joint policy of insurance; Petitioner maintained separate charge accounts with banks and local businesses in the name of Derringer; the wedding announcements of Petitioner's four children all identified her as Mrs. Derringer; and the letter carrier on Mr. Seay's route testified that, until about 1976, he had delivered no letters addressed to Petitioner except as Mrs.

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<sup>2</sup> See letter at 4a, 718 F.2d at 1281. The representative did not, at that time, explain to Petitioner the significance for her F.E.C.A. benefits, if any, of a common law marriage.

Derringer; thereafter he continued to deliver business correspondence addressed to Mrs. Derringer, and occasional personal mail, such as Christmas cards, addressed to "Mrs. Coke Seay." Mr. Seay had also identified himself as a widower on a sale of land in 1973. Petitioner did not consider herself to be Coke Seay's wife, and many business acquaintances, fellow church members, and family members testified to her declarations that she was not Seay's wife.

The principal evidence that Petitioner had been identified as "Mrs. Seay" came from her church, where she was sometimes known as "Mrs. Seay," although more often just as "Mama Lou." There was also evidence from the government's informant, James Spradley, Sr., Petitioner's former son-in-law, who had reported Petitioner to the F.B.I. Mr. Spradley testified to a few declarations by Petitioner and others, over a period of many years, identifying Petitioner as the wife of Coke Seay. Spradley also directed the prosecution to an unrecorded utility easement, obtained in 1973 to provide telephone service to Spradley's mobile home located on Mr. Seay's land; Mr. Seay denied having signed the easement, but Spradley had notarized a renunciation of dower on the easement by Petitioner as "Louise Seay." Spradley had also notarized Petitioner's signature as "Mary Louise Derringer" on another document at about the same time in 1973.

By timely pre-trial motions Petitioner raised objections under the Fifth Amendment that, *inter alia*, the concept of common law marriage under South Carolina law was too vague to give fair notice, for purposes of a criminal prosecution, of what conduct would constitute a common law marriage. Petitioner also preserved, by motions for judgment of acquittal at the close of the government's case and at the close of all the evidence, her objections to the sufficiency of the evidence, *inter alia*, to establish a common law marriage.

Petitioner was sentenced to two years imprisonment, suspended on the service of six months, five years probation, and restitution of \$13,261.92, for the three counts under 18 U.S.C. § 1001. For the one count under § 1921, Petitioner was sentenced to five years probation, concurrently with the other probationary sentence.

On appeal, Petitioner addressed the Due Process issues and the sufficiency of the evidence both with respect to the interpretation of what information was required by the Department of Labor, and with respect to the definition and evidence of common law marriage.

With respect to the information required by the Department of Labor, the majority of the panel below addressed her contentions (1) that the record would not sustain a conviction because the proof showed ambiguities in the forms Petitioner filled out; (2) that none of the communications received by Petitioner from the government advised her that any relation other than a ceremonial marriage need be reported to the Department of Labor; 16a-17a, 718 F. 2d at 1286.

The court below treated these issues as follows:

1. The majority below held that Petitioner could be found to have wrongful intent as long as the questions did not "preclude a reasonable interpretation that the agency might be interested in something other than a ceremonial marriage." 14a, 718 F. 2d at 1286. The dissenting judge, in contrast, found that the forms were not only ambiguous, but affirmatively misleading. 16a-18a, 718 F. 2d at 1287-88.<sup>3</sup>

2. The majority below held that, although some questions on the government forms that Petitioner filled out

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<sup>3</sup> The issues of whether the evidence could sustain a conviction as a matter of Due Process, compare *Jackson v. Virginia*, 443 U.S. 307 (1979), and whether there was fair notice as required by Due Process are closely related and were discussed together in the Court below. They are separated here for clarity of exposition.

in 1977, 1978, and 1980 "might lead a person to think that only a ceremonial marriage was at issue," the overall inquiry and a statement she signed in 1962 in which she (concededly truthfully) disclaimed any common law marriage "would alert an individual to other possibilities." 14a, 718 F. 2d at 1286. The dissenting judge found that no constitutionally fair notice was given, 18a, 718 F. 2d at 1287-88: "the evidence did not show that the defendant had actual knowledge of the duty to report her common law marriage. Nor was there proof of the probability of such knowledge, for . . . the forms the government furnished her were misleading because they referred only to ceremonial marriages."

With respect to the definition of common law marriage in South Carolina, Petitioner argued both (1) that the law did not provide fair notice of what conduct would establish the relation, and (2) that the evidence was not sufficient to prove the relation. Petitioner sought to demonstrate that the issue of fair notice was particularly acute because the state court would not entertain a declaratory judgment action to ascertain the validity of the marriage.<sup>4</sup>

1. As to the issue of fair notice, the majority below acknowledged that Petitioner challenged "the lack of specificity of the proscribed conduct," but discussed only the prohibition on false statements. Petitioner's point, that the status to be described was not specifically defined by law, was not addressed by the majority. 10a-11a, 718 F. 2d at 1284. The dissenting judge found that, by reference in the charge to the jury to the "law of God" as part of the definition of common law marriage, the trial judge had rendered the concept void for vagueness. 23a-24a, 718 F. 2d at 1290.

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<sup>4</sup> This matter was before the Family Court, which had announced its intention to decline jurisdiction before the trial below. An appeal was subsequently prosecuted, without result, to the State Supreme Court. *Derringer v. Seay*, 296 S.E. 2d 341 (S.C. 1982).

2. As to the sufficiency of the evidence to prove a common law marriage, the majority noted that the evidence of "holding out" and reputation was divided, but that the evidence presented a question of fact for the jury. 6a-8a, 718 F. 2d at 1282-83.

#### REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the decision below is flatly in conflict with all prior decisions of the Courts of Appeals as to the application of 18 U.S.C. § 1001 to statements that can reasonably be deemed to be thought by the defendant to have been truthful. *United States v. Anderson*, 579 F. 2d 455 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978); *United States v. Diogo*, 320 F. 2d 898 (2d Cir. 1963). This Court should take this opportunity authoritatively to resolve this conflict. The type of evidence presented here has universally been considered insufficient to establish an offense.

This Court should further grant certiorari to address important questions of constitutional and statutory construction presented here. Literally millions of persons receive federally funded benefits, or otherwise participate in programs for which certifications to federal agencies are required. The instant case presents an opportunity for this Court to address serious, and potentially far-reaching, questions as to the constitutional standards for fair notice of prohibited conduct, both in standards established by agency action and in standards adopted by Congress from state law. The role of reputation and community perceptions in common law marriages raises important questions as to whether such community perceptions are necessarily vague, virtually guaranteeing arbitrary enforcement. *Kolender v. Lawson*, — U.S. —, 51 U.S.L.W. 4532 (1983); *Gooding v. Wilson*, 405 U.S. 518 (1972). Important questions are presented whether a common law marriage is, like criminal libel, or breach of the peace, at common law, too vague a concept

to meet modern Due Process standards of fair notice. *Ashton v. Kentucky*, 384 U.S. 195 (1966); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

**I. The decision below conflicts with all prior decisions of Courts of Appeals applying 18 U.S.C. § 1001 to ambiguous questions.**

As Mr. Justice Blackmun wrote in reversing a conviction for making false statements under 15 U.S.C. § 714m (a), in *Jacobs v. United States*, 359 F. 2d 960, 966 (8th Cir. 1966) :

"We realize that the defendant may have acted carelessly or even foolishly . . . . But carelessness or lack of wisdom is not equivalent to the knowledge of falsity required by the statute."

This approach has been adopted by the Courts of Appeals in prosecutions under 18 U.S.C. § 1001. Where there are ambiguities in the question asked, or in the answer in the context of the question, it has uniformly been held that § 1001 requires that the government "negative any reasonable interpretation that would make the defendant's statement factually correct." *United States v. Anderson*, 579 F. 2d 455, 460 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978); *United States v. Diogo*, 320 F. 2d 898, 907 (2d Cir. 1963). See also *United States v. Clifford*, 426 F. Supp. 696, 706 (E. D. N.Y. 1976); *United States v. Steinhilber*, 484 F. 2d 386, 389-90 (8th Cir. 1973).<sup>5</sup> Cf. *H & M Mov-*

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<sup>5</sup> The same standards have been applied in perjury prosecutions in other circuits. *United States v. Wall*, 371 F.2d 398, 400 (6th Cir. 1967); *United States v. Cook*, 497 F.2d 753, 768-69 (9th Cir. 1972) (Ely, J., dissenting), adopted by the court, 489 F.2d 286 (9th Cir. 1973). The logic of this interpretation follows this Court's ruling, through the Chief Justice, that if an answer is literally true, it cannot be the subject of a perjury prosecution. *Bronston v. United States*, 409 U.S. 352, 359 (1973): "A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the

*ing, Inc. v. United States*, 499 F. 2d 660, 671 (Ct. Cl. 1974). A cogent reason for such restrictive application is that, where a question contains a potential ambiguity, the defendant can be prosecuted for *any* answer she provides. *United States v. Clifford, supra*, 426 F. Supp. at 706, citing *United States v. Cook, supra* at note 5, 497 F. 2d at 768. Rather than place citizens on the horns of such a dilemma, the Courts of Appeals have held that, "Under 18 U.S.C. § 1001 a person does not answer official questions at his peril." *United States v. Diogo, supra*, 320 F. 2d at 906.

Here, it was found by the majority that on the forms that Petitioner answered, as part of the subject of this prosecution, "the questions of when and where the marriage was performed might lead a person to think that only a ceremonial marriage was at issue," although the forms did not "preclude a reasonable interpretation that the agency *might* be interested in something other than a ceremonial marriage (emphasis supplied)." Of course, these phrases indicate that it was also *reasonable* "to think that only a ceremonial marriage was at issue," even though some of the language might suggest a broader inquiry.

Further, either answer to the question, "Have you remarried?" could have subjected Petitioner to prosecution. If Petitioner had claimed a common law marriage on any of the forms at issue here, she would have been entitled to a lump-sum benefit under 5 U.S.C. § 8135(b); but if the Department of Labor had determined she had

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extent that it bears on whether 'he does not believe [his answer] to be true.' " Since the burden of persuasion is on the government, where there is more than one reasonable interpretation of the question answered, the Courts of Appeals have required the prosecution to show the answer to be false for all such interpretations; otherwise, the jury would "be permitted to engage in conjecture whether an [ambiguous] answer, true and complete on its face, was intended to mislead."

falsely claimed a common law marriage, she would have been subject to prosecution for asserting such a marriage. Instead, she found herself prosecuted for denying such a marriage.

The ambiguity here is not fanciful. The prosecution's witness from the Department of Labor testified *at trial* that he would not know what to do if a recipient of survivor's benefits under 5 U.S.C. § 8183(b) (like Petitioner) advised him of an asserted common law marriage; *it had never happened*. He also testified that, to the best of his interpretation, the form on which Petitioner allegedly made false statements by denying re-marriage *did not mention common-law marriage*.\*

Thus, since a reasonable person could interpret the forms as applying only to a ceremonial marriage, and Petitioner's answers were factually truthful if only a ceremonial marriage was at issue, there is a reasonable interpretation of the forms, not negated by the government, that makes Petitioner's statements factually truthful. In fact, Petitioner testified, without contradiction, that her actual interpretation of the forms was limited to ceremonial marriages. Trial Transcript, pages 297-98. If the conflict in the circuits is resolved in favor of the

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\* Trial Transcript, pages 53-57. The witness Floyd Ansley, in reference to the forms for which Petitioner was prosecuted, testified as follows:

Q. Say anything in there about a common law relationship being an indication that they have to notify the Department of Labor?

A. Are you asking me whether or not common law marriage is mentioned on this form?

Q. Yes, sir. That's exactly what I am asking.

A. Not that I see. I don't see it, sir.

Mr. Ansley also testified that the form that advised Petitioner to report a remarriage to obtain lump sum benefits under 5 U.S.C. § 8185(b), 28a, did not say anything about a common law marriage.

prior cases, such as *Diogo* and *Anderson*, Petitioner is entitled to reversal of her conviction.

Instead, the majority put the burden of clarifying the ambiguity on the Petitioner, 14a, 718 F.2d at 1286:

"Merely because a question is asked in a certain manner on a government form does not relieve an individual of notifying the agency where there are doubts about proper compliance with the requirements for receiving benefits."

Truly, the majority held that the Petitioner must "answer official questions at [her] peril," directly in conflict with the ruling of the Court of Appeals for the Second Circuit in *United States v. Diogo*, *supra*. The majority's conclusion is particularly curious because it failed to explain the apparent conflict of its holding in this case with the Fourth Circuit's approval, in *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980), of the application of § 1001 established in *Diogo* and *Anderson*.<sup>7</sup> In *Race*, the Court expressly stated that, where an ambiguity is latent, "there was no obligation . . . to inquire. . . ." 632 F.2d at 1121.

Thus, there is a plain and irreconcilable conflict between the decision below and the prior decisions of the Courts of Appeals which have held that a prosecution under 18 U.S.C. § 1001 for making false statements can-

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<sup>7</sup> As the majority noted, Petitioner did sign a statement in 1962, fifteen years before the first statement for which she was prosecuted, in which she stated (truthfully, without any question, 17a, 718 F.2d at 1287) that she had not entered a common law marriage. 3a-4a, 14a, 718 F.2d at 1231, 1286. The majority omitted reference to Petitioner's uncontradicted testimony that the government in 1962 ignored her request to explain the significance of the statement. Tr. 300. As the dissenting judge noted, nothing in the 1962 statement gave Petitioner notice of the significance of a common-law marriage, 17a, and there is no evidence of any such explanation in the record.

not be predicated on statements whose meaning,<sup>8</sup> in the context where made, are subject to several interpretations, any one of which is inconsistent with guilt.<sup>9</sup>

**II. The instant case presents important constitutional questions of whether either the government's communications with Petitioner or the application of the doctrine of "common law marriage" violated Due Process of Law.**

This case presents important questions of what notice is required by the Due Process Clause to advise widows and widowers in the 18 states that recognize common law marriages (1) that they have entered a common law marital relationship, and (2) that they must report this relationship to federal or other authorities.<sup>10</sup> The scope of the fair notice required before a criminal prosecution is invoked is important to literally millions of American citizens who receive benefits from income security programs, hundreds of thousands of military veterans, and tens of thousands of farmers and students.<sup>11</sup> The pre-

<sup>8</sup> The trial court correctly construed the charge under 18 U.S.C. § 1921 also to require specific intent knowingly to accept benefits to which Petitioner was no longer entitled. Of course, if Petitioner did not knowingly make false statements, she did not knowingly accept benefits improperly.

<sup>9</sup> In addition to the sufficiency of the evidence under 18 U.S.C. § 1001, as a matter of Due Process, Petitioner has also preserved for review the sufficiency of the evidence to prove a common law marriage under South Carolina law. This is an issue, however, that Petitioner suggests should be addressed, if at all, by certification to the South Carolina Supreme Court, if such action becomes appropriate, under Rule 46 of the Rules of the Supreme Court of South Carolina, 22 S.C. Code, 1976, as amended. Cf. *Elkins vs. Moreno*, 435 U.S. 647, 666 (1978).

<sup>10</sup> Under the circumstances of this case, the trial judge properly instructed the jury that proof of both offenses required that Petitioner had knowingly entered a common law marriage. See, e.g., Tr. p. 388.

<sup>11</sup> See a brief sampling of statutes listed in Appendix D, *infra*, pages 30a-31a.

vailing interpretation is that 18 U.S.C. § 1001 applies to any statement or certification, even if not made to a federal agency, as long as federal funds or federal participation is involved. *See, e.g., United States v. Wolf*, 645 F.2d 23, 25 (10th Cir. 1981), and cases there cited. With this broad scope, it is probable that, in a majority of American households, every month, or at least every year, someone makes a statement that, if false, might be the subject of prosecution under 18 U.S.C. § 1001.

*A. There is an important question whether plastic state law concepts of "common law marriage" are too vague to be enforced in federal criminal prosecutions.*

It is well settled, as this Court held only last term in *Kolender v. Lawson*, — U.S. —, 51 U.S.L.W. 4532, 4533 (1983), that

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

The instant case demonstrates that if "common law marriage" is included as a "marriage" for purposes of 18 U.S.C. § 1921, serious questions are presented both (1) as to whether widows and widowers cohabiting with others have fair notice of their marital status, and (2) as to whether the plastic notions of "common law marriage" encourage arbitrary enforcement.

In South Carolina, as in many states recognizing common law marriages, lengthy cohabitation is not sufficient to establish a common law marriage. *Tedder v. Tedder*, 108 S.C. 271, 279, 94 S.E. 19, 21 (1917). Consistent declarations of marriage are not sufficient, of themselves, to establish a common law marital relation, *Tedder v. Tedder, supra*, and consistent denials are not sufficient to de-

feat a finding of common law marriage. *Jeanes v. Jeanes*, 255 S.C. 161, 177 S.E. 2d 537 (1970).<sup>13</sup> When Petitioner moved into Coke Seay's home in December, 1962, it was thought that reputation to prove a common law marriage must be undivided,<sup>14</sup> but subsequently the South Carolina Supreme Court held that it need only be "prevailing." *In re Greenfield's Estate*, 245 S.C. 595, 603, 141 S.E. 2d 916, 920 (1965).

The foregoing discussion illustrates the difficulty, under rules of common law marriages, of ascertaining what conduct will be held to create such a relation, even if the parties do not think a marriage exists.<sup>15</sup> Where the community's response to the parties' conduct is so critical to establishing the facts, an important question is presented whether the standard of responsibility involves the *responses of others*, rather than the conduct of the parties, so that the standard is vague because it is "wide open," *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966), and "licenses the jury to create its own standard in each case." *Gooding v. Wilson*, 405 U.S. 518, 528 (1972). As the dissenting judge noted, in this case the vagueness problem was accentuated by the fact that the trial judge charged the jury, based on South Carolina decisions, that common law marriage is determined, in part, "according to what we believe to be the law of God." 23a-24a, 718 F.2d at 1290.

Thus, an important question is presented whether, for purposes of criminal liability, incorporation of common

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<sup>13</sup> See 52 AM. JUR. 2d Marriage § 56 for similar decisions in other jurisdictions. The *Jeanes* case is instructive, in that several South Carolina judges disagreed whether the status of a common law marriage was shown.

<sup>14</sup> Note, "Common-Law Marriage: What It Is and How to Prove It," 12 S.C.L.Q. 355, 361 (1960).

<sup>15</sup> Both parties here denied any intention to enter a common-law marriage. *Derringer v. Seay*, 296 S.E. 341 (S.C. 1982).

law notions of marriage into 18 U.S.C. §§ 1001 and 1921 suffers similar defects of vagueness to the common law crimes held void for vagueness in *Ashton v. Kentucky, supra* (criminal libel); *Edwards v. South Carolina*, 372 U.S. 229, 236-38 (1963), and *Cantwell v. Connecticut*, 310 U.S. 196 (1940).

**B. There is an important question of how precise government communications must be to give a recipient adequate notice of a reporting requirement.**

There is no question but that Petitioner had to "have some notice that [her alleged common law] relationship must be reported. *See Lambert v. California*, 355 U.S. 225 (1957)." 16a, 718 F.2d at 1287. It was conceded at trial that the forms by which the government communicated with Petitioner did not give notice of this reporting requirement. The Assistant Regional Administrator for the division of the Department of Labor that administers these benefits did not know, at trial, what the effect of an asserted common law marriage would be on such benefits.<sup>15</sup>

Can the government rely on communications long before the period in question, or does Due Process require that the communications be reasonably contemporaneous with the alleged criminal acts? Does mention of a status put a recipient on notice that common law marriage must be reported, as the majority held at 14a, or must the notice specify "that such a relationship must be reported," as the dissenting judge argued at 17a. The extent to which the government must make its forms and other communications precise in order to give fair notice of criminal liability is a constitutional question of substantial importance. There is a strong policy argument that just as "Precise questioning is imperative as a predicate for the offense of perjury," *Bronston v. United States, supra*, 409 U.S. at 362, precise questions on government forms are required, by constitutional standards of fair notice, as a

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<sup>15</sup> See note 6, *supra*.

predicate for prosecutions for false statements under 18 U.S.C. § 1001.

#### CONCLUSION

This case presents important issues, both in a conflict between the Circuit Courts of Appeals, and in important questions of constitutional law. The question of application of 18 U.S.C. § 1001 is significant and would illuminate that important statute from a different perspective from *United States v. Rodgers*, 706 F. 2d 854 (8th Cir.), *cert. granted*, No. 83-620, 52 U.S.L.W. 3435 (U.S. Sup. Ct. Dec. 5, 1983).

For the foregoing reasons, the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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January 9, 1984

## **APPENDICES**

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 81-5285

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UNITED STATES OF AMERICA,  
*Appellee,*  
vs.

MARY LOUISE SEAY, a/k/a  
MARY LOUISE DERRINGER,  
*Appellant.*

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Appeal from the United States District Court  
for the District of South Carolina, at Columbia  
Charles E. Simons, Jr., District Judge

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Argued: June 8, 1983

Decided: October 11, 1983

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Before HALL and CHAPMAN, Circuit Judges and  
BUTZNER, Senior Circuit Judge

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John D. Delgado (J. Edward Bell on brief) for Appellant;  
Eric Wm. Ruschky, Assistant United States Attorney  
(Henry Dargan McMaster, United States Attorney  
on brief) for Appellee.

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## CHAPMAN, Circuit Judge:

Mary Louise Seay, also known as Mary Louise Derringer, appeals her conviction on three counts of making false statements to the Department of Labor that she had not remarried since the death of her first husband (18 U.S.C. § 1001<sup>1</sup>) and on one count of knowingly accepting about \$14,000 in Federal Employees Compensation Act (FECA) benefits that she was not entitled to receive because she had remarried. 18 U.S.C. § 1921.<sup>2</sup> On the three counts under § 1001, which are felonies, she was sentenced to two years, suspended on service of six months with five years probation. She was also ordered to repay \$13,261.92 in benefits.<sup>3</sup> For violation of § 1921, a misdemeanor, imposition of sentence was suspended and the appellant was placed on five years probation, to run concurrently with the probation on the three other counts. On appeal Mrs. Seay challenges the sufficiency of the evidence relating to her common law mar-

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<sup>1</sup> 18 U.S.C. § 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

<sup>2</sup> 18 U.S.C. § 1921 provides:

Whoever, being entitled to compensation under sections 8107-8118 and 8133 of title 5 and whose compensation by the terms of those sections stops or is reduced on his marriage or on the marriage of his dependent, accepts after such marriage any compensation or payment to which he is not entitled shall be fined not more than \$2,000 or imprisoned not more than one year, or both.

<sup>3</sup> The amount to be paid in restitution was the sum of the benefits received during the period within the statute of limitations.

riage. She also argues that her constitutional rights of due process under the fifth amendment were violated. We find, however, that the evidence was sufficient for the jury to find that Mrs. Seay had entered into a common law marriage under South Carolina law, that she knew she was married and that she filed the false statements that she had not remarried with the intent that the government act upon the misrepresentations. The jury also had sufficient evidence to conclude that the defendant accepted compensation after remarriage. Finding further that defendant's constitutional rights were not violated, we affirm the district court.

## I

The defendant became eligible for FECA benefits because of the death of her husband, Edward Derringer, in 1950 while he was an active duty reservist. After Derringer's death, his widow applied for and received benefit payments until they were terminated by the Department of Labor in March 1981.

Prior to the marriages of her children, the appellant received \$189.45 per month, plus \$165.77 per month on account of her four children.

In December 1962, defendant and her four children moved from their residence in Columbia, South Carolina to the home of Coke Seay, a widower, who lived in the nearby town of Lexington. The couple had sexual relations both before and after they began living together. Defendant testified that when she first moved in with Coke Seay she intended to marry him but later changed her mind. The two lived together in the same house until 1981 when Mrs. Seay moved out on the advice of her attorney. This was after the Department of Labor began its investigation into her marital status.

Approximately nine months before moving to Coke Seay's house, defendant signed the following handwritten

statement that was presented to her by a Department of Labor agent:

This is to advise that I, Mrs. Mary L. Derringer, residing at 3030 Park Street, Columbia, South Carolina, wish to state that I have not remarried, or entered into a common-law marital relationship.

In addition to B. E. Compensation, my three children receive \$67.40 Social Security and I receive \$29.30 per month.

I wish to continue the practice of having my check mailed to my Mother's address at 1115 Northwood Street, Columbia, South Carolina. (EV 492)

Mrs. Seay testified at trial that she asked the agent why he had come and whether he was making a periodic check. When he asked her to sign the statement she replied, "Yes, I will sign it, but I don't understand why that you are talking about common law, remarriage and all of that, because I have not entered into either one of them."

Shortly after the couple began living together, they transferred their church memberships from separate churches to the Providence Lutheran Church in Lexington. They joined this church as "Mr. and Mrs. Coke Seay" and appeared in the church pictorial directory as "Coke & Louise Seay." At trial the minister of Providence Lutheran Church testified that the church's members considered the couple to be married. The two were members of this church for approximately nineteen years, from 1962 until 1981 when the defendant transferred her membership back to the Park Street Baptist Church where she had previously been a member.

After she was first awarded compensation, appellant received a copy of a Department of Labor form dated November 3, 1953 entitled "Compensation Order Award of Compensation." Among the Findings of Fact were "[t]hat the claimant above named is entitled to compen-

sation on her own account until she dies or remarries." Instructions that accompanied the Compensation Order provided that "[i]f, when a check reaches you, your status has changed through remarriage or otherwise . . . you should return the check immediately to this office accompanied by a full explanation of any change in the status of yourself."

Sometime shortly after July 4, 1966 defendant also received a "Notice to Payee" statement. It provided:

The Federal Employees' Compensation Act provides your right to compensation as a widow (or dependent widower) ceases when you remarry. Because of a recent amendment to the Compensation Act you may upon remarriage after July 4, 1966 receive a lump sum payment equal to 24 times the monthly compensation you are receiving for yourself.

You are required to promptly notify the Bureau when you remarry. Before the lump sum is paid the Bureau will require a copy of the public record of your remarriage which bears the certificate and seal of the custodian of the public marriage records. If practicable, it should be sent in with your notice of remarriage.

The convictions for filing false statements were based on Mrs. Seay's responses to questions on a form entitled Claim for the Continuance of Compensation. Appellant filled out this form, sent to her yearly by the Department of Labor, on July 1, 1977, May 6, 1978 and December 15, 1980. She answered the following question "no": Have you married since the death of the above named employee? Yes— No— If 'yes' complete 10." Question 10 was "[w]hen and where was the marriage performed and what was the change in name, if any?" The form provided additional space for answers to questions 10, 11 and 12. The following statement appeared beside the claimant's signature:

I declare under the penalties of perjury that the information contained on this form is true and correct: and that I will immediately notify the office of worker's compensation programs of any change in status.

After learning of the possibility of prosecution, Mrs. Seay brought a declaratory judgment action in Lexington County Family Court to have the marriage declared invalid. The decision of the family court that it lacked subject matter jurisdiction was affirmed by the South Carolina Supreme Court. *Derringer v. Seay*, — S.C. — 207 S.E.2d 341 (1982). The supreme court concluded that there was no justiciable controversy because both parties alleged that no valid marriage existed.<sup>4</sup>

## II

Defendant argues that the evidence of the marriage was insufficient as a matter of law and that the trial court erred in not granting a directed verdict of acquittal. Defendant contends that both parties explicitly denied being married, that Coke Seay never held himself out as being married, that reputation as to defendant's marital status was divided and that some members of the community had assumed that a marriage existed because of the cohabitation of the parties.

The South Carolina Supreme Court has recognized that a common law marriage may exist despite denials by the husband and wife. In *Jeanes v. Jeanes*, 255 S.C. 161, 177 S.E. 2d 537 (1970) Mr. Jeanes, who had agreed to pay alimony to his wife until she died or remarried, peti-

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<sup>4</sup> The South Carolina Supreme Court also observed that, at the family court hearing, appellant and Coke Seay, who was the respondent, testified that they had never held themselves out to be married. This testimony was contradicted by witnesses for the prosecution in the trial of the instant case. It appears clear to us that the couple was in effect asking the family court to give an advisory opinion that they were not married.

tioned to have the payments terminated because his former wife had entered into a common law marriage. Both the former wife and Mr. Swygert, the man that she was living with, denied any intent to be married. The court found, however, that facts such as the cohabitation by the couple for over two years, city directory listings of the two as husband and wife, insurance records in which Mr. Swygert had given the woman's name as wife and beneficiary, a post office box rented by the woman under the name Mae Jeanes Swygert and tax returns in which Mr. Swygert listed the same post office box as his wife's address showed the requisite intent to be married notwithstanding the statements of the couple.

At trial the defense presented evidence that at times Coke Seay and appellant had denied being married to each other and had acted in ways that indicated their intent to be single.<sup>5</sup> The government, however, introduced evidence of indicia of marriage including specific instances in which the couple had held themselves out as married.<sup>6</sup> Appellant does not argue that the trial court

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<sup>5</sup> The defense introduced evidence of the following facts: (1) appellant and Coke Seay filed income tax returns as single persons under two different names (Seay and Derringer); (2) the couple maintained separate finances (although defendant conceded that she handled Coke Seay's finances for him); (3) defendant used the name Derringer in business transactions, in public records, and in the newspaper marriage announcements of her four children; (4) Coke Seay noted on a 1973 property transaction that he was a widower; and (5) at trial witnesses testified concerning instances in which the couple had denied being married to each other.

<sup>6</sup> The government's evidence included the following facts: (1) In 1962 the couple joined the Providence Lutheran Church as Mr. and Mrs. Coke Seay and were listed as such in the church's pictorial directory. (2) The minister of Providence Lutheran Church testified that the church members accepted the couple as husband and wife. (3) The mailman who since 1959 had delivered mail in the area of appellant's former house and of her mother's house testified that he knew defendant as Mrs. Mary Louise Derringer Seay and that he had heard "from some of the neighbors and friends" that

erred in instructing the jury concerning the prerequisites for a common law marriage in South Carolina. We find that, based on the record there was sufficient evidence for the jury to find beyond a reasonable doubt that appellant and Coke Seay had entered into a common law marriage.<sup>7</sup>

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she had married and moved to Lexington. This mailman was also a member of the Park Street Baptist Church, appellant's church prior to her move to Lexington. (4) The mailman for the route including Coke Seay's house testified that he delivered mail of a personal nature ("Christinas cards, birthday cards, or just somebody writing to her") addressed to Mrs. Coke Seay, Route 7, Lexington, South Carolina and delivered business mail addressed to Mary Louise Derringer at the same address. (5) Jim Spradley, the divorced husband of appellant's daughter, Melba, testified that Coke Seay was initially introduced to him as Melba's stepfather or as Melba's mother's husband. Spradley testified that he addressed appellant as Mrs. Seay and that once, when Melba and Jim Spradley were having an argument about defendant's marital status, appellant came to the Spradley house and told Jim Spradley that "yes, she was married" to Coke Seay. (6) In 1973 appellant signed "Louise Seay" on a renunciation of dower for a right-of-way easement involving property owned by Coke Seay. (7) The 1967 and 1968 city directories for Lexington listed "Mrs. Coke Seay" as the assistant manager of a local liquor store. Appellant testified that she worked in a Lexington liquor store two days a week for three weeks.

<sup>7</sup> The inconsistency between presenting herself as Mrs. Derringer in her business transactions and as Mrs. Seay in matters of a more personal nature could have caused the jury to interpret appellant's actions as a deliberate attempt to conceal her relationship with Coke Seay in order not to lose the FECA benefits. For example, appellant requested that her FECA benefits checks be sent either to her mother's address (even after her mother's death) or to a post office box instead of having the check mailed to the house where appellant actually resided. At oral argument, defendant's attorney agreed that one interpretation of Mrs. Seay's actions could have been that she was concerned about concealing her status from the government but not necessarily from the community. It seems clear to us that this was the interpretation that the jury gave to her conduct.

## III

The jury was also properly charged by the trial court concerning the elements of 18 U.S.C. § 1001. These elements are "the making (a) 'in any matter within the jurisdiction of any department or agency of the United States,' of (b) a false statement of (c) material fact with (d) fraudulent intent. *United States v. Race*, 632 F.2d 1114, 1116 (4th Cir. 1980) (citations omitted). The jury was instructed:

First, the prosecution must prove beyond a reasonable doubt that the defendant made and used or caused to be made and used a false statement, writing or document as to a material fact in relation to a matter within the jurisdiction of a department or agency of the United States, as charged.

Secondly, that she did such act or acts knowing at that time that the writing or document was false or fictitious and fraudulent, as charged in each of these three counts of the indictment.

And third, that she did such act or acts knowingly and willfully as I have now defined those terms to you.

And again I say that all three of those elements as to those three offenses must be proved beyond a reasonable doubt.

The terms knowingly and willfully were defined by the trial court:

An act is done willfully if done voluntarily and intentionally, and with the specific intent to do something which the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

And the word knowingly is added in order to ensure that no defendant will be convicted in this court who made or caused to be made a statement or repre-

sentation which was false, because of some mistake or accident or any other reason on the part of the defendant.

In his charge concerning common law marriage, the trial court indicated that in order to find her guilty, the jury needed to conclude that appellant knew she was married: "Under the common law of South Carolina in reference to these common law marriages, it is essential to a common law marriage that there shall be a mutual agreement and understanding between the parties to assume toward each other the relationship of husband and wife." The jury was also instructed that in order to have a common law marriage "there must be the intent. The intent in marriage consists of living together by agreement of a man and woman as husband and wife, according to what we know to be the law of this state and according to what we believe to be the law of God."

#### IV

Defendant argues that her constitutional rights of due process under the fifth amendment were violated by her conviction. At the outset, it is important that we clearly define what is, and what is not, encompassed by this decision. Appellant speaks of "the general rationale opposing the maintaining of common law crimes," "the lack of specificity as to the proscribed conduct" and the limited right of incorporation of "state penal law." Mary Louise Seay was not convicted, however, of having entered into a common law marriage. Entering into a common law marriage is not a crime in South Carolina nor in the other eighteen states that recognize the doctrine. The crimes for which she was indicted, violations of 18 U.S.C. § 1001 and of 18 U.S.C. § 1921, could have been the basis for an indictment in all fifty states. The crime is that of making a false written statement as to a material fact to an agency or department of the United States.

There are thousands of different factual situations that citizens certify to various departments of the government

every day. In some instances the false statement concerns something that in itself constitutes a crime. In many cases, however, as in the instant case, the criminal element is found exclusively in the misrepresentation or nondisclosure of a material fact. *See, e.g., United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978) (§ 1001 violation where defendant told customs officials that he was not returning from a trip abroad); *United States v. Gilbertson*, 588 F.2d 584 (8th Cir. 1978) (false statement concerning ownership of grain stored in a grain elevator); *United States v. London*, 550 F.2d 206 (5th Cir. 1977) (question of sufficiency of indictment; court found concealment of material fact where defendants failed to state in application for Farmers Home Administration loan that properties were encumbered with junior liens).

## V

Defendant contends that the principles and policies of this court's decision in *Nemetz v. Immigration and Naturalization Service*, 647 F.2d 432 (4th Cir. 1981) are instructive in the instant case. We find, however, that significant differences outweigh the similarities between the two cases. In *Nemetz* the defendant was denied naturalization based on his failure to rebut the inference that he had committed sodomy in violation of Virginia law.\* The court found that the constitutional requirement of uniformity in naturalization matters (U.S. Const. art. I, § 8, cl. 4) mandated that state criminal law not be relied on to define "good moral character" where inconsistent results would be reached in different states.

There is no constitutional mandate of uniformity with respect to 18 U.S.C. § 1001. Nor is there any compelling need for absolute uniformity such that only a ceremonial

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\* As noted above, the instant case does not involve a state crime. State law is involved only with respect to the formalities requisite to a valid marriage within the state.

marriage may be accorded the status of marriage by the Department of Labor. It is a well-established rule that a state has the power to determine how its residents enter into a marital relationship. *Maynard v. Hill*, 125 U.S. 190, 205 (1887).<sup>9</sup> Variations in state law concerning the prerequisites to a valid marriage may work to the advantage of a resident. See, e.g. *Albina Engine and Machine Works v. J. J. O'Leary*, 328 F.2d 877 (9th Cir. 1964) cert. denied, 379 U.S. 817 (claimant was "widow" of decedent because the two had entered into a nonceremonial marriage recognized by local law. The claimant was, therefore, entitled to receive death benefits under the Longshoreman's and Harbor Workers' Act); *Day v. Secretary of Health and Human Services*, 519 F.Supp. 872 (D.S.C. 1981) (claimant found to have properly received Social Security benefits where a valid common law marriage existed between claimant and her retired "husband"); *Old Republic Insurance Company v. Christian*, 389 F.Supp. 335 (E.D. Tenn. 1975) (woman was entitled to share in Tennessee workmen's compensation benefits arising out of work-related death of her common law husband where common law marriage was entered into in either Georgia or Alabama).<sup>10</sup>

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<sup>9</sup> The court described the state's role in defining a valid marriage:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution. 125 U.S. at 206.

<sup>10</sup> *Nemetsz* is also distinguishable because the "accident of geography" criticism is not entirely applicable to the instant case. The *Nemetsz* court noted that the Immigration and Naturalization Service would have been unable to oppose *Nemetsz*' petition on the ground of bad moral character in states in which sodomy was not a crime.

## VI

Defendant contends that her due process rights were violated because any reasonable person would have concluded from the Department of Labor forms that the agency was only interested in knowing whether a ceremonial marriage had been performed. This contention is belied primarily by the fact that in 1962 appellant signed a statement that she had not "entered into a common-law marital relationship." This statement put appellant on notice that the Department of Labor was concerned about any marriage which could change her entitlement to benefits.

Defendant argues that, notwithstanding her signature on this statement, she had no reason to know the legal elements of common law marriage in South Carolina and

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The conclusion was that "but for an 'accident of geography,' Nemetz perhaps would be a naturalized citizen today." 647 F.2d at 435.

Defendant's statement that Mrs. Seay could not have been prosecuted in any of the other four states within the Fourth Circuit is not precisely correct. The general rule is that the validity of a marriage is determined by the law of the state with the most significant relationship to the spouses and the marriage and that a marriage valid where contracted is valid everywhere. *Restatement (Second) Conflicts of Laws* § 283 (1971). See, e.g., *Metropolitan Life Insurance Company v. Holding*, 293 F.Supp. 854 (E.D.Va. 1968) (applying Virginia law; held that common law marriage, valid under either Florida or Ohio law, would be recognized by Virginia where parties were not forbidden to marry under Virginia law); *Goldin v. Goldin*, 48 Md. App. 154, 426 A.2d 410, 411 (1981) (holding that plaintiff did not meet the burden of proof necessary to establish a common law marriage, court observed that "Maryland has continuously held that a common-law marriage, valid where contracted, is recognized in this State."); *Harris v. Harris*, 257 N.C. 416, 126 S.E.2d 83, 85 (1963) (citing rule that if relationship of plaintiff and defendant, residents of South Carolina, constituted a common law marriage in South Carolina, such marriage would be given full recognition in North Carolina). Mrs. Seay, therefore, could have conceivably been prosecuted in other states for violations of § 1001 and § 1921 if her common law marriage had first been entered into in South Carolina.

should not be penalized for her lack of expertise. Given the actual notice provided in 1962, however, detailed knowledge of the common law doctrine would not have been necessary for an individual to be aware that benefits received only by virtue of being the widow of one man might be in jeopardy when the "widow" was living with another man and holding herself out, at least in certain circles, as the wife of the second man.

Nor do the Department of Labor forms preclude a reasonable interpretation that the agency might be interested in something other than a ceremonial marriage. Appellant sweeps with too broad a brush when she argues that it would not have been possible for her to comply with the agency's forms. Although the questions of when and where the marriage was performed might lead a person to think that only a ceremonial marriage was at issue, the broad references to changes in status would alert an individual to other possibilities. The clear meaning of the "Notice to Payee" statement is not that benefits are only to be terminated by a ceremonial marriage; instead the notice specifies that, in order for the lump sum payment to be made, a record of the remarriage should be furnished to the Department of Labor.

Government forms, moreover, are not written in stone. The appellant was given actual notice in 1962. Merely because a question is asked in a certain manner on a government form does not relieve an individual of the responsibility of notifying the agency where there are doubts about proper compliance with the requirements for receiving benefits.

The dissent raises the religious issue and refers to the cross-examination of the defendant as "a theological inquisition" and also questions a portion of the charge which refers to the "law of God." Under different circumstances this might be a cause of concern, but in the present case the appellant did not raise an exception or

orally argue that she was prejudiced by the Biblical discussions she had with the Assistant United States Attorney or the judge's charge. In all probability this reluctance was due to the fact that appellant interjected religion into the case while she was on direct examination and carried a Bible throughout the trial, referring to it as "my security blanket."

**AFFIRMED.**

BUTZNER, Senior Circuit Judge, dissenting:

I

In 32 states which do not recognize common law marriages, a soldier's widow can live with a man without forfeiting her pension or suffering prosecution for fraud because she signed the identical form the defendant signed. When the government through criminal prosecution draws a distinction between the marital status of soldiers' widows living in 18 states and those living in the other 32, the government should be required to give fair notice that signing a form, which it provides, is a criminal act in some states although innocent in others.

At the most, the record discloses a civil controversy between the government and the defendant over her entitlement to a pension. Apparently this is the initial prosecution for fraud against a soldier's widow who has not disclosed her common law marriage. Consummating a common law marriage is not a criminal offense. Therefore, when the basis for a conviction for violating 18 U.S.C. §§ 1001 and 1921 is the nondisclosure of a common law marriage and the receipt of a pension after such a marriage, due process of law requires that the defendant have some notice that this relationship must be reported. *See Lambert v. California*, 355 U.S. 225 (1957). The statute itself does not give this notice. Nowhere in § 1921 is there a definition of marriage or an elaboration of the means of becoming married.

Furthermore, the "continuance of compensation" forms—the basis for defendant's conviction for misrepresenting her marital status—did not give this notice. Indeed, these forms mislead a soldier's widow with respect to the necessity of reporting a common law marriage. The forms require information only as to whether the widow had remarried and, if so, when and where the remarriage was performed. This would cause a reasonable pensioner to conclude that the government was in-

terested only in reports of formally celebrated remarriages. A person has no obligation to inquire about the meaning of a government form which contains a latent ambiguity. *United States v. Race*, 632 F.2d 1114, 1121 (4th Cir. 1980).

Similarly, the "notice to payee" sent to the defendant required a copy of the public record of marriage. This, too, would mislead the soldier's widow into believing that only celebrated marriages were required to be reported. This ambiguity in the government's definition of marriage is particularly inexcusable when the widow's representation that she had not entered into a marriage is the sole basis for her conviction of criminal fraud.

To sustain the prosecution by showing notice, the government relies primarily on a handwritten statement signed by the defendant in 1962 some 15 years before the prosecution. In it she said she had "not remarried or entered into a common law marital relationship." The statement, apparently written by a government agent, did not notify the defendant that upon entering into a common law marriage her pension would be terminated, nor did it advise her that such a relationship must be reported. It did not inform her that such a relationship was a "marriage" within contemplation of § 1921 providing criminal penalties for receipt of a pension after marriage. Her statement that she had not "remarried or entered into a common law marital relationship" was true. It was made before she moved in with Coke Seay.

Consequently, I am unable to accept the government's contention that the 1962 statement adequately notified the defendant that execution of a "continuation of compensation" form would constitute a fraudulent misrepresentation punishable by federal criminal law. Also, in light of the misleading text of the "continuation of compensation" form and the "notice to payee," she was not provided adequate notice that receipt of her pension after a com-

mon law marriage was a crime. As *Lambert v. California*, 355 U.S. 225 (1957), demonstrates, adequate notice is an essential component of due process when the prohibited conduct is not blameworthy in itself. *Lambert* involved a municipal ordinance that made it a crime for felons to fail to register with the police department. The Supreme Court held that the ordinance violated due process when applied to a person who had no actual knowledge of the duty to register and there was no proof of the probability of such knowledge. *Lambert*, 355 U.S. at 229-30. Similarly, in this prosecution, the evidence did not show that the defendant had actual knowledge of the duty to report her common law marriage. Nor was there proof of the probability of such knowledge, for, as I have pointed out, the forms the government furnished her were misleading because they referred only to ceremonial marriages. Here, as in *Lambert*, the defendant was denied due process of law because she did not receive from the government adequate notice of her statutory obligations arising out of her residence in a state that recognizes common law marriage.

## II

Another aspect of the case demonstrates that the defendant has been deprived of her liberty without due process of law. During the defendant's cross-examination, the prosecutor set about what best can be described as a theological inquisition. The record reveals numerous attempts by the prosecutor to inject religious issues in this jury trial. Referring to her contributions to her church, the prosecutor asked her if she gave "the widow's mite." After testifying that she swore she did not continuously live with Coke Seay, the prosecutor asked: "Didn't Jesus teach us that we are to be known by our work and that we are not to swear to things?" The prosecutor also examined her extensively from the Bible and about her beliefs concerning marriage and fornication. I have set forth in the margin excerpts from this impermissible

cross-examination.\* Although they illustrate the objectionable tenor of this prosecution, only by reading the

- \* Q You agree with me that marriage is ordained by God?
- A I certainly do.
- Q And now, it is not a sacrament in the Baptist church. I believe it's a sacrament in the Catholic church, but it's not a sacrament in the Baptist church.
- A I don't know what a sacrament is.
- Q Well, there are only two sacraments in the Baptist church, the Lord's Supper and baptism.
- A That's correct.
- Q But you do agree with me that marriage is ordained by God?
- A I certainly do.
- Q Okay. I noticed yesterday you were carrying a Bible. Do you have it today?
- A Yes, I do. It's right there. That is a Bible that my parents gave to me in 1940.
- Q King James version?
- A That's exactly right.
- Q Do you mind if I use the New American Standard?
- A I don't like that.
- Q I am sorry. You mind if I use it?
- A I don't mind if you use it, but I don't like it.
- Q Turn with me if you will to Genesis 2, verses 18 and 24.
- A All right.
- Q Do you have it? Permit me to read it.

"Then the Lord God said, 'It is not good for the man to be alone. I will make him a helper suitable for him.'"

Skipping down to verse 24.

"For this cause a man shall leave his father and his mother and shall cleave to his wife, and they shall become one flesh."

Doesn't say anything about a woman leaving her father and mother.

\* \* \* \*

- Q Turn with me if you will to Matthew 15, verse 19.
- A All right.
- Q Do you have that?
- A I certainly do.
- Q Jesus is speaking. Okay?
- A All right. I know that. Mine is in red.

[Footnote continued on page 20a]

entire transcript can one apprehend the prejudice the prosecutor sought to engender. It is quite apparent that

\* [Continued]

Q Mine too. "For out of the heart come evil thoughts, murders, adulteries, fornications, thefts, false witness, slanders."

\* \* \* \*

Q All right. First Corinthians, 6. Do you have it? First Corinthians, 6, verses 9 through 11.

\* \* \* \*

A All right.

Q Paul writing to the Church at Corinth. "Or do you not know that the unrighteous shall not inherit the kingdom of God? Do not be deceived; neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor homosexuals, nor thieves, nor covetous, nor drunkards, nor revilers, nor swindlers shall inherit the kingdom of God, and such were some of you, but you were washed, but you were sanctified, but you were justified in the name of the Lord Jesus Christ and in the spirit of our God."

\* \* \* \*

Q The gospel.

A That's correct. My gospel here, Mr. Ruschky. I do not like the wording of the new ones. It brings in about people that I don't appreciate.

Q May I ascribe that to our difference in age, Ma'am?

A Yes, you may.

Q You know what fornication is?

MR. BELL [defense attorney]: Your honor, we object. This case is not having to do with adultery. It has to do with defrauding the government.

MR. RUSCHKY [prosecutor]: I didn't ask her what adultery was.

MR. BELL: We object to it. Fornication has nothing to do with this case. She has admitted this thing—

THE COURT: Well, I think he can ask her if she knows what it is.

MR. BELL: Your honor, we also object because it is highly prejudicial. Mr. Ruschky knows what he is trying to do. He is trying to get someone to look at her as being a sinful woman against God, instead of a breaker of the law.

[Footnote continued on page 21a]

the prosecutor's theological excursion injected into this trial the prejudicial notion that even if the defendant did

\* [Continued]

THE COURT: I understand your position. You have said enough. Go ahead, Mr. Ruschky.

By Mr. Ruschky:

Q Well, we are all sinners.

\* \* \* \*

Q You know what fornication is?

A No. I will tell you that. I don't know what fornication is.

Q Permit me to read you the definition from the South Carolina State Code.

MR. BELL: I object to that again. Further object. She has said she doesn't know what it is.

I object to Mr. Ruschky trying to read to the jury and to this court what fornication is. It has nothing to do with the elements in this case.

MR. RUSCHKY: I will hand it up, let her read it for herself.

MR. BELL: Object, your honor.

THE COURT: I don't see any objection to her reading it. I don't understand what he intends to do.

MR. BELL: We would object. It's irrelevant and immaterial.

THE COURT: Let's just stay away from these things, Mr. Ruschky.

\* \* \* \*

MR. RUSCHKY: Your honor, there is more to fornication—

THE COURT: All right. I will let you go ahead, since it's gotten to this point.

By Mr. Ruschky:

Q You want to just read it, Ma'am?

A If it pleases you.

Q Well, I am not particularly pleased with it.

\* \* \* \*

THE WITNESS: "Fornication defined. Fornication is the living together and carnal intercourse with each other or habitual carnal intercourse with each other without living together of a man and woman, both being unmarried."

\* \* \* \*

[Footnote continued on page 22a.]

not enter into a common law marriage with Coke Seay, she violated the "law of God" against fornication as expounded by the Bible. When a prosecutor oversteps the bounds of propriety and fairness in his cross-examination and it is impossible to say that the jury was not influenced by this misconduct, the conviction must be reversed. *See Berger v. United States*, 295 U.S. 78, 84-89 (1934).

### III

The prosecutor's cross-examination was exacerbated by the instructions to the jury. In explaining the intent necessary to consummate a common law marriage, the court charged:

The intent in marriage consists of living together by agreement of a man and woman as husband and wife, according to what we know to be the law of this state and according to what we believe to be the law of God.

Overruling an objection to the "law of God," the court stated: "Well, that was taken from a South Carolina Supreme Court decision."

This charge was likely to mislead the jury into thinking they could convict the defendant by ascertaining her intent "according to what we believe to be the law of God." The basis for this religious belief has been laid

---

\* [Continued]

Q —You understand then that you were living with Coke Seay, living with him for approximately 18 years.—

A Not all that time, Mr. Ruschky. I beg to differ with you, sir. . . .

I have not continuously lived in that house.

Q All right. I mean you say that.

A Yes, I say it, and I swear to it.

Q Now, it's now necessary for you to say that you swear to it. You are already under oath.

A That's right. That's exactly right. But I reiterate, please, sir.

Q Didn't Jesus teach us that we are to be known by our word and that we are not to swear to things?

by the prosecutor's scriptural references to marriage and fornication. It was reinforced by the court's overruling of the objection pertaining to the injection of fornication into the trial of this case. I am persuaded the injection of these religious issues into this criminal trial deprived the defendant of the fundamental fairness which the due process clause was intended to assure as a hallmark of every criminal trial.

Also, the district court's charge that the elements of a common law marriage in South Carolina require an intent to enter into a marital relationship, "according to what we believe to be the law of God" inextricably introduced into this trial a religious test that runs afoul of the first amendment. In *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969), the trial court found it necessary to weigh the significance and meaning of religious doctrines in order to resolve a property dispute. The Supreme Court held that the judgment must be reversed because courts cannot, consistently with the first amendment, determine ecclesiastical questions. 393 U.S. at 449-50. Here, too, the judgment must be reversed because the court's charge impermissibly required the jury to determine the "law of God" in deciding whether the defendant had entered into a common law marriage.

Alternatively, the charge renders the concepts of a South Carolina common law marriage impermissibly vague in the context of a federal criminal prosecution. In *Papachristou v. City of Jacksonville*, 405 U.S. at 156, 162 (1972), the Court held that a Jacksonville vagrancy ordinance was void for vagueness because it failed "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" and encouraged arbitrary enforcement.

In this prosecution, the question of the defendant's intent when she lived with Coke Seay was central to the government's case. Without the intent to enter into a common law marriage, she could not be convicted under

either § 1001 or § 1921 of the federal criminal code. Ecclesiastical history reveals that reasonable people have frequently differed over the meaning and content of the "law of God." The defendant, however, was convicted of a crime because an essential element of her marital status was determined by a jury according to what its members believed to be the "law of God." In view of the differences that reasonable persons can ascribe to the "law of God," this standard is impermissibly vague.

A widow of reasonable intelligence, charged with a crime for which guilt is dependent on proof of disputed marital status, cannot foretell whether her receipt of a pension is a crime when proof of her status depends on what individual members of a jury believe to be the "law of God."

Consequently, applying the principles explained in *Papachristou*, I conclude that the religious standard adopted by the district court in its charge rendered the concept of a South Carolina common law marriage so vague that the defendant was convicted without due process of law.

I would reverse the judgment of conviction.

APPENDIX B

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

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No. A-415

MARY LOUISE SEAY, aka MARY LOUISE DERRINGER,  
*Petitioner,*  
v.

UNITED STATES

---

ORDER EXTENDING TIME TO FILE PETITION  
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for  
petitioner,

IT IS ORDERED that the time for filing a petition for  
writ of certiorari in the above-entitled cause be, and the  
same is hereby, extended to and including January 9,  
1984.

/s/ Warren E. Burger  
*Chief Justice of the United States.*

Dated this 5th day of December, 1983

## APPENDIX C

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

## United States Constitution, Amendment Five:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## United States Code, Title 5:

8102. Compensation for disability  
or death of employee

(a) The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, unless the injury or death is—

(1) caused by willful misconduct of the employee;

(2) caused by the employee's intention to bring about the injury or death of himself or of another; or

(3) proximately caused by the intoxication of the injured employee.

## 8133. Compensation in case of death

(a) If death results from an injury sustained in the performance of duty, the United States shall pay a monthly compensation equal to a percentage of the

monthly pay of the deceased employee in accordance with the following schedule:

(1) To the widow or widower, if there is no child, 50 percent.

(2) To the widow or widower, if there is a child, 45 percent and in addition 15 percent for each child not to exceed a total of 75 percent for the widow or widower and children.

(3) To the children, if there is no widow or widower, 40 percent for one child and 15 percent additional for each additional child not to exceed a total of 75 percent, divided among the children share and share alike.

(4) To the parents, if there is no widow, widower, or child, as follows:

(A) 25 percent if one parent was wholly dependent on the employee at the time of death and the other was not dependent to any extent;

(B) 20 percent to each if both were wholly dependent; or

(C) a proportionate amount in the discretion of the Secretary of Labor if one or both were partly dependent.

If there is a widow, widower, or child, so much of the percentages are payable as, when added to the total percentages payable to the widow, widower, and children, will not exceed a total of 75 percent.

(5) To the brother, sisters, grandparents, and grandchildren, if there is no widow, widower, child, or dependent child, or dependent parent, as follows—

(A) 20 percent if one was wholly dependent on the employee at the time of death;

(B) 30 percent if more than one was wholly dependent, divided among the dependents share and share alike; or

(C) 10 percent if no one is wholly dependent but one or more is partly dependent, divided among the dependents share and share alike.

If there is a widow, widower, or child, so much of the percentages are payable as, when added to the total percentages payable to the widow, widower, children, and dependent parents, will not exceed a total of 75 percent.

(b) The compensation payable under subsection (a) of this section is paid from the time of death until—

(1) a widow, or widower dies or remarries before reaching age 60;

(2) a child, a brother, a sister, or a grandchild dies, marries, or becomes 18 years of age, or if over age 18 and incapable of self-support becomes capable of self-support; or

(3) a parent or grandparent dies, marries, or ceases to be dependent.

Notwithstanding paragraph (2) of this subsection, compensation payable to or for a child, a brother or sister, or grandchild that would otherwise end because the child, brother or sister, or grandchild has reached 18 years of age shall continue if he is a student as defined by section 8101 of this title at the time he reaches 18 years of age for so long as he continues to be such a student or until he marries. A widow or widower who has entitlements to benefits under this title derived from more than one husband or wife shall elect one entitlement to be utilized.

#### 8135. Lump-sum payment

(b) On remarriage before reaching age 60, a widow or widower entitled to compensation under section 8135 of this title, shall be paid a lump sum equal to twenty-four times the monthly compensation payment (excluding compensation on account of another individual) to which he was entitled immediately before the remarriage.

United States Code, Title 18:

1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

1921. Receiving Federal employee's compensation after marriage

Whoever, being entitled to compensation under sections 8107-8113 and 8133 of title 5 and whose compensation by the terms of those sections stops or is reduced on his marriage or on the marriage of his dependent, accepts after such marriage any compensation or payment to which he is not entitled shall be fined not more than \$2,000 or imprisoned not more than one year, or both.

## APPENDIX D

SELECTED PROGRAMS SUBJECT TO  
18 U.S.C. § 1001

Social Security Act 42 U.S.C. § 401 *et seq.*

Supplemental Security Income 42 U.S.C. § 13E1 *et seq.*

Aid To Families With Dependent Children 42 U.S.C.  
§ 601 *et seq.*

Food Stamps 7 U.S.C. § 2011 *et seq.*

Medicare 42 U.S.C. § 1302 *et seq.*

Medicaid 42 U.S.C. § 1396 *et seq.*

Unemployment Compensation 42 U.S.C. §§ 501-504 and  
1101-1105; and 26 U.S.C. § 301 *et seq.*

Black Lung Disease Benefits 30 U.S.C. § 901 *et seq.*

Farm Housing Act 42 U.S.C. § 1471 *et seq.*

Rail Road Retirement Act 45 U.S.C. § 228A *et seq.*

Veterans Education Assistance Act 38 U.S.C. § 1650 *et seq.*

Veterans Dependency and Indemnity Compensation Act  
38 U.S.C. § 401 *et seq.*

Veterans Housing and Housing Act 38 U.S.C. § 1801 *et seq.*

Veterans Hospital Nursing Home Domiciliary and Medi-  
cal Care Act 38 U.S.C. § 601 *et seq.*

Veterans Insurance Act 38 U.S.C. § 701 *et seq.*

Veterans Pension Act 38 U.S.C. § 501 *et seq.*

Veterans Burial Benefits Act 38 U.S.C. § 901 *et seq.*

Veterans Specially Adapted Housing Act 38 U.S.C. § 801  
*et seq.*

Post Vietnam Era Veterans Education Act 38 U.S.C. § 1601 *et seq.*

Veteran Survivors' and Dependents' Educational Assistance Act 38 U.S.C. § 1700 *et seq.*

Training and Rehabilitation For Veterans With Service Connected Disabilities 38 U.S.C. § 1500 *et seq.*

Automobile and Adaptive Equipment For Certain Disabled Veterans and Members of the Armed Forces 38 U.S.C. § 1901 *et seq.*

General Veteran Benefits 38 U.S.C. § 301 *et seq.*

Price Support of Agricultural Commodities 7 U.S.C. § 1421 *et seq.*

Agricultural Credit Act 7 U.S.C. § 1921 *et seq.*

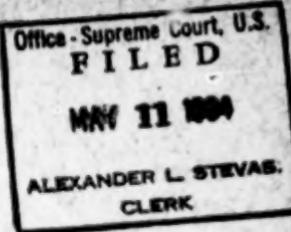
Low Rent Housing Act 42 U.S.C. § 1401 *et seq.*

Longshoremen's and Harbor Workers' Compensation Act 36 U.S.C. 901 *et seq.*

Federal Program of Insurance Loans To Graduate Students In Health Profession Schools 42 U.S.C. § 294 *et seq.*

Higher Education Resources and Student Assistance Programs 20 U.S.C. § 1001 *et seq.*

No. 83-1128



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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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MARY LOUISE SEAY, a/k/a MARY LOUISE DERRINGER,  
PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### **QUESTIONS PRESENTED**

1. Whether petitioner's statements that she had not re-married, made on forms she submitted in order to continue receiving federal employees' compensation benefits, afforded an adequate ground for her convictions for making false statements, in violation of 18 U.S.C. 1001.
2. Whether petitioner's common law marriage was properly used to prove that she made false statements, in violation of 18 U.S.C. 1001, and that she received federal employees' compensation to which she was not entitled, in violation of 18 U.S.C. 1921.

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# In the Supreme Court of the United States

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No. 83-1128

MARY LOUISE SEAY, a/k/a MARY LOUISE DERRINGER,  
PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 718 F.2d 1279.

### JURISDICTION

The judgment of the court of appeals was entered on October 11, 1983. On December 5, 1983, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 9, 1984 (Pet. App. 25a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on three counts of making false statements in a matter within the jurisdiction of a federal agency, in violation of 18

U.S.C. 1001, and on one count of knowingly receiving federal employees' compensation to which she was not entitled, in violation of 18 U.S.C. 1921. Petitioner was sentenced to two years' imprisonment on the three Section 1001 counts, all but six months of which was suspended in favor of five years' probation. Sentencing on the Section 1921 count was suspended in favor of five years' probation, to run concurrently with the sentence on the Section 1001 counts. In addition, petitioner was ordered to make restitution in the amount of \$13,261.92.

1. The evidence at trial (see Pet. App. 3a-6a) showed that in 1950 petitioner became eligible for benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, because of the death of her husband, Edward Derringer, while he was on active duty as a reservist. After Derringer's death, petitioner applied for and received benefit payments. Thereafter, petitioner received a copy of a Department of Labor form dated November 3, 1953, entitled "Compensation Order Award of Compensation." The award included a finding of fact "[t]hat the claimant above named is entitled to compensation on her own account until she dies or remarries." Instructions that accompanied the Compensation Order provided that "[i]f, when a check reaches you, your status has changed through remarriage or otherwise . . . you should return the check immediately to this office accompanied by a full explanation of any change in the status of yourself." Pet. App. 4a-5a.

Under 5 U.S.C. 8133(b)(1), FECA compensation is paid until a widow or widower dies or remarries before reaching age 60. On remarriage before reaching age 60, a widow or widower is entitled to a lump-sum payment equal to 24 times the monthly compensation payment to which he or she was entitled immediately before the remarriage (5 U.S.C. 8135). In 1962, a Department of Labor agent visited

petitioner. At the agent's request, petitioner signed the following handwritten statement:

This is to advise that I, Mrs. Mary L. Derringer, residing at 3030 Park Street, Columbia, South Carolina, wish to state that I have not remarried, or entered into a common-law marital relationship.

In addition to B.E. Compensation, my three children receive \$67.40 Social Security and I receive \$29.30 per month.

I wish to continue the practice of having my check mailed to my Mother's address at 1115 Northwood Street, Columbia, South Carolina.

Petitioner testified that she asked the agent why he had come and whether he was making a periodic check. When the agent asked her to sign the statement she replied, "Yes, I will sign it, but I don't understand why that you are talking about common law, remarriage and all of that, because I have not entered into either one of them." Pet. App. 3a-4a.

In December 1962, approximately nine months after she had signed the statement, petitioner and her four children moved from their residence in Columbia, South Carolina, to the home of Coke Seay, a widower who lived in the nearby town of Lexington. The couple had sexual relations both before and after they began living together. Shortly after they began living together, petitioner and Seay transferred their church memberships from separate churches to the Providence Lutheran Church in Lexington. They joined the church as "Mr. and Mrs. Coke Seay" and appeared in the church pictorial directory as "Coke & Louise Seay." The minister of the Providence Lutheran Church testified that the church's members considered the couple to be married. The couple continued to be members of the church from 1962 until 1981. The mailman who delivered mail in the

neighborhood of petitioner's former house and her mother's house testified that he knew petitioner as Mrs. Seay and that he had heard that she had married and moved to Lexington. The mailman for the route that included Coke Seay's house testified that he delivered mail of a personal nature addressed to Mrs. Coke Seay. Petitioner's former son-in-law testified that he addressed her as Mrs. Seay and that she had stated to him that she was married to Coke Seay. In 1973 petitioner signed "Louise Seay" on a renunciation of dower for a right-of-way easement involving property owned by Coke Seay. Pet. App. 4a, 7a-8a n.6.

During the time she lived with Seay, petitioner filed her income tax returns under the name Derringer and generally referred to herself as Derringer in business transactions and public records (Pet. App. 7a n.5). Petitioner also used the name Derringer in her correspondence with the Labor Department, and she did not advise the Department of her relationship with Seay. Petitioner requested that her FECA benefits be sent either to her mother's address (even after her mother died) or to a post office box, rather than to the house where she resided with Seay (*id.* at 8a n.7). Petitioner filled out Labor Department forms entitled "Claim for the Continuance of Compensation" on July 1, 1977, May 6, 1978, and December 15, 1980. The forms included the question: "Have you married since the death of the above named employee? Yes \_\_\_\_\_ No \_\_\_\_\_ If 'yes' complete 10." Petitioner marked "No" in response to that question. Pet. App. 5a. Petitioner's convictions for false statements were based on those responses.

In 1981, after the Labor Department began an investigation into her marital status, petitioner moved out of Coke Seay's house on the advice of her attorney. In addition, she

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<sup>1</sup>Question 10 asked: "When and where was the marriage performed and what was the change in name, if any" (Pet. App. 5a).

transferred her membership back to the Park Street Baptist Church, where she had previously been a member. The Labor Department terminated FECA payments to petitioner in March 1981. Pet. App. 3a, 4a.

2. The court of appeals affirmed petitioner's convictions, one judge dissenting (Pet. App. 1a-24a). The court held that there was sufficient evidence for the jury to find beyond a reasonable doubt that petitioner and Coke Seay had entered into a common law marriage (*id.* at 6a-8a). The court of appeals concluded that the trial court had instructed the jury properly concerning the elements of 18 U.S.C. 1001 (Pet. App. 9a-10a). The court rejected petitioner's claim that her due process rights were violated by her convictions. It concluded that petitioner could not have been misled by the questions on the Department of Labor forms, because the statement she signed in 1962 put her on notice that the Department was concerned with any marriage that could change her entitlement to benefits (*id.* at 13a-14a). Finally, the court held that references to religious issues during the trial did not constitute reversible error, since petitioner did not object to the references and in fact had herself interjected the issue of religion into the case (*id.* at 14a-15a).

Judge Butzner, in dissent, took the view that "[a]t the most, the record discloses a civil controversy" (Pet. App. 16a). In his view, petitioner had insufficient notice that she was required to report a common law marriage. Judge Butzner also concluded that the prosecutor had engaged in unfair cross-examination and that the trial court's definition of common law marriage deprived petitioner of due process. *Id.* at 16a-24a.

#### **ARGUMENT**

Petitioner contends that she could not be convicted under Section 1001 because a reasonable person could have concluded from the Labor Department forms that the agency

was interested in knowing only whether a ceremonial marriage had been performed. In addition, she contends that her common law marriage could not properly be used to establish violations of Sections 1001 and 1921 because state law is too vague to put parties on notice of whether their conduct creates such a relationship. The validity of these contentions appears to depend primarily on the sufficiency of the evidence concerning whether petitioner entered into a common law marriage and whether she made false statements with the requisite knowledge of their falsity.

We recognize that the evidence in this case regarding petitioner's marital status and her knowledge thereof was borderline, but the jury's verdict is not without support in the record. See *Glasser v. United States*, 315 U.S. 60, 80 (1942). Moreover, the holding of the court of appeals seems clearly fact-bound. The facts of this case are quite unusual and are unlikely to recur. Thus, the case does not appear to warrant review by this Court.

1. Petitioner contends first (Pet. 8-12, 15-16) that her convictions under Section 1001 should be reversed because it was unclear whether the questions on the Labor Department forms referred to common law marriage or only to ceremonial marriage. It is true that the initial question concerning remarriage did not refer explicitly to common law marriage; but neither did it state that the Department was interested only in ceremonial marriages. The question "[h]ave you married since the death of the above named employee?", asked in connection with a claim for FECA benefits, normally would be understood to refer to any marriage. Since South Carolina recognizes common law marriage, the question, as applied to petitioner, referred to both ceremonial and common law marriages.<sup>2</sup>

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<sup>2</sup>The Labor Department clearly had reason to inquire about any sort of marriage, including common law marriage. Under 5 U.S.C. 8133(b)(1)

It is the presence of Question 10, which asked “[w]hen and where \* \* \* the marriage [was] performed \* \* \*?” that creates some uncertainty about whether the initial question referred to common law marriage. However, the jury must have concluded that petitioner was not confused by the questions, since its verdict implicitly incorporates a finding that petitioner knew her statements were false. The trial court instructed the jury on the elements required for proof of a Section 1001 violation, including actual falsity and intent to make a false statement.<sup>3</sup> The court also instructed the jury on the elements necessary for a common law marriage under South Carolina law, including agreement to be

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and 8135, Congress has provided for a lump sum payment and termination of death benefits received under FECA when a beneficiary remarries prior to age 60. The statute on its face does not differentiate between ceremonial marriage and common law marriage, and there is no reason to believe Congress intended to refer only to ceremonial marriages. Congress presumably chose remarriage as the triggering event for termination of benefits because individuals who are married obtain certain legal rights (e.g., rights to support and rights in a spouse's estate) that unmarried individuals do not enjoy. Since the legal consequences of common law marriage are the same as those of ceremonial marriage, it would be natural for Congress to refer to both. By the same token, it is not in the least anomalous that cohabitation in states that do not recognize common law marriage would not cause a termination of FECA benefits, since cohabitation without remarriage would not by law provide alternative economic obligations that could take the place of the FECA benefits.

<sup>3</sup>The trial court instructed the jury, *inter alia*, that it was required to find that petitioner made a false statement “knowing at that time that the writing or document was false or fictitious and fraudulent” (C.A. App. 420); that “[a]n act is done knowingly if done voluntarily and intentionally, and not because of mistake or accident or any other innocent reason” (*id.* at 426); that “[a]n act is done willfully if done voluntarily and intentionally, and with the specific intent to do something which the law forbids” (*ibid.*); and that “the word knowingly is added in order to ensure that no defendant will be convicted in this court who made or caused to be made a statement or representation which was false, because of some mistake or accident or any other reason on the part of the defendant” (*ibid.*).

married.<sup>4</sup> The jury's verdict indicates that it found beyond a reasonable doubt that petitioner knew she had entered into a common law marriage and knew that her statements that she had not remarried were false. Thus, the jury must have rejected any claim by petitioner that she did not understand the questions on the Labor Department forms or realize that she was responding falsely.<sup>5</sup>

The court of appeals concluded that there was sufficient evidence to support the jury's findings (Pet. App. 6a-8a, 13a-14a).<sup>6</sup> The court of appeals correctly noted (*id.* at 13a) that in 1962, at the request of a Labor Department investigator, petitioner signed a statement that she had not entered into a common law marriage. That statement put petitioner on notice that the Department was concerned with common law marriages and that any such marriage could change her entitlement to FECA benefits.<sup>7</sup> The court of appeals also

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<sup>4</sup>The trial court instructed the jury that "it is essential to a common law marriage that there shall be a mutual agreement and understanding between the parties to assume toward each other the relationship of husband and wife" (C.A. App. 421-422). Petitioner acknowledges (Pet. 12 n.10) that the trial court properly instructed the jury that it was required to find that petitioner knowingly entered into a common law marriage.

<sup>5</sup>In any event, we note that the situation in this case is unlikely to recur. The Department of Labor advises us that it is in the process of revising the form on which petitioner made her false statements, so that the questions concerning remarriage will include an explicit reference to common law marriage.

<sup>6</sup>See also the trial judge's statement before discharging the jury (C.A. App. 447) ("I think from the evidence you have reached a fair and a just verdict, one that I would personally consider supported by the evidence in the case") and his comments at sentencing (*id.* at 476).

<sup>7</sup>In the 1962 statement, petitioner represented that she had "not remarried, or entered into a common-law marital relationship" (Pet. App. 4a). In addition, petitioner testified that she told the Labor Department investigator that she had not entered into "common law, remarriage and all of that" (*ibid.*).

noted (*id.* at 8a n.7) that the inconsistency between petitioner's use of the name Mrs. Derringer in her business transactions and her use of the name Mrs. Seay in nonbusiness matters could have suggested to the jury a deliberate attempt to conceal her common law marriage in order not to lose FECA benefits to which petitioner knew she was no longer entitled.

Petitioner suggests (Pet. 8-12) that the decision below conflicts with several Section 1001 cases holding that when there are ambiguities in a question the government must "negative any reasonable interpretation that would make the defendant's statement factually correct." *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir.), cert. denied, 439 U.S. 980 (1978). See also *United States v. Diogo*, 320 F.2d 898, 905-907 (2d Cir. 1963). However, the Fourth Circuit itself has adopted this same test in *United States v. Race*, 632 F.2d 1114, 1120 (1980) (quoting *Anderson*). Thus, the decision below would create at most an intracircuit conflict that would not warrant this Court's attention. See *Wisniewski v. United States*, 353 U.S. 901 (1957).

In any event, there appears to be no conflict between *Anderson* and *Diogo*, on the one hand, and the decision below, on the other. Since the court below cited *Race* (Pet. App. 9a), it presumably was aware that the standard articulated in *Anderson* is the law of the Fourth Circuit. The court could have concluded that *Anderson* and *Diogo* were distinguishable on their facts. In *Anderson* the court found that the government had failed to prove willfulness and knowing falsity, and in *Diogo* the court concluded (320 F.2d at 909) that the government had not proved the marital status of the defendants under the relevant state law. Here, in contrast, the court of appeals concluded that there was sufficient evidence to support the jury's findings that petitioner had entered into a common law marriage under

South Carolina law and that she acted knowingly and willfully in making false statements.<sup>8</sup>

2. Petitioner also contends (Pet. 13-15) that her common law marriage could not be used to establish violations of Sections 1001 and 1921 because state law is too vague to put parties on notice of whether their conduct creates such a relationship. But the jury must have found that petitioner herself knew she was married. South Carolina courts have held that agreement to be married is essential to a common law marriage. See, e.g., *Johnson v. Johnson*, 235 S.C. 542, 550, 112 S.E.2d 647, 651 (1960). The trial court accordingly charged, *inter alia*, that "it is essential to a common law marriage that there shall be a mutual agreement and understanding between the parties to assume toward each other the relationship of husband and wife" (Pet. App. 10a). The court also instructed the jury that in order to convict

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<sup>8</sup>And see *United States v. Diogo*, 320 F.2d at 907 ("In a prosecution for perjury or false representation, absent fundamental ambiguity of the kind found in [ *United States v. Lattimore*, 127 F. Supp. 405 (D.D.C.), aff'd, 232 F.2d 334 (D.C.Cir. 1955) ], the question of what a defendant meant when he made his representation will normally be for the jury."); see also *United States v. Carrier*, 654 F.2d 559, 562 (9th Cir. 1981); *United States v. Weatherspoon*, 581 F.2d 595, 601 (7th Cir. 1978); *United States v. Lanier*, 578 F.2d 1246, 1252 (8th Cir.), cert. denied, 439 U.S. 856 (1978); *United States v. Steinhilber*, 484 F.2d 386, 389 (8th Cir. 1973).

Petitioner cites (Pet. 9) a passage from the court of appeals opinion in which the court stated that the Labor Department forms did not "preclude a reasonable interpretation that the agency might be interested in something other than a ceremonial marriage" (Pet. App. 14a). However, that statement does not appear to be a rejection of the general principle set out in *Anderson*, *Diogo*, and *Race*. Instead, it may reflect the view that that general principle does not apply in cases in which an individual in fact understands a question, whether or not others might find it to be ambiguous. The court made the quoted observation only after it concluded that the statement petitioner signed in 1962 gave her actual notice that a common law marriage would result in termination of her FECA benefits.

petitioner of the criminal charges against her it had to find that she made the false statements "knowing at that time that the writing or document was false \* \* \*" (*id.* at 9a), *i.e.*, that she knew she was married when she made the statements.

As the court of appeals noted (Pet. App. 7a & n.6), there was considerable evidence that petitioner and Coke Seay had held themselves out as married in a number of instances. See also pages 3-4, *supra*. In addition, the jury was entitled to conclude from the evidence of petitioner's attempts to conceal from the government her relationship with Coke Seay that she knew she was married to him. See Pet. App. 8a n.7. In these circumstances, petitioner cannot complain of either insufficient notice or arbitrary enforcement in connection with the prosecution's use of her common law marriage to establish violations of federal law. See *Kolender v. Lawson*, No. 81-1320 (May 2, 1983), slip op. 5.

Petitioner states (Pet. 12 n.9) that she "has also preserved for review the sufficiency of the evidence to prove a common law marriage under South Carolina law." To the extent the court of appeals was uncertain about the legal standard for common law marriage under South Carolina law, it presumably could have certified the question to the South Carolina Supreme Court, as petitioner notes (Pet. 12 n.9). See *Clay v. Sun Insurance Office Limited*, 363 U.S. 207, 212 (1960). Rule 46 of the Rules of the Supreme Court of South Carolina provides that that court in its discretion may answer a question of law certified to it by any federal court if there is no controlling precedent of the South Carolina Supreme Court on that question. We are uncertain whether the certification procedure would extend to a mixed question of law and fact concerning the application of the legal standard to the particular facts of this case. In any event, that question of state law clearly does not warrant consideration by this Court.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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MAY 1984

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STEVENS

CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

MARY LOUISE SEAY, a/k/a  
MARY LOUISE DERRINGER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1983

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No. 83-1128

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REPLY BRIEF FOR PETITIONER

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The response of the Solicitor General suggests discomfort with the result in this case, by "recogniz[ing] that the evidence in this case regarding petitioner's marital status and her knowledge thereof was borderline" (Brief in Opposition, 6). Yet the government seeks to uphold the palpably unjust result below by arguing that the result is "fact-bound," and that the facts are sufficient to justify the verdict.

To the extent that the result is "fact-bound," this case, of course, does *not* warrant review in this Court, although, as we argue below, a sense of justice would sug-

gest that this Court should certify the "fact-bound" question of state law to the South Carolina Supreme Court. The Petitioner can be guilty of an offense only if, under the unique provisions of South Carolina court decisions, she had entered a common-law marriage in South Carolina (a marriage relation that cannot be contracted in a majority of states). The State Court should be asked to give an authoritative ruling on its law.<sup>1</sup>

The fact that the government's response seeks to focus on evidence, however, serves to accentuate the fact that the government has not responded at all to the principal arguments of the Petition: (1) that an ambiguous question cannot lawfully produce a criminally false answer, even if the jury thought the answer was false as the defendant understood the question, and (2) the concept of "common law marriage," particularly where marriage was defined "according to what we believe to be the law of God," is too vague to define a standard of criminal liability.

1. The interests of justice argue strongly for certification of the question of the existence of a common-law marriage, uniquely subject to definition by the State, to the South Carolina Supreme Court.

As the Solicitor General notes in his Opposition, 11, the Supreme Court of South Carolina, under Rule 46 of its Rules, has discretion to answer a question of law certified to it by a federal court. Whether the evidence of record, viewed in the light most favorable to the prosecution, was sufficient to prove, beyond a reasonable doubt,

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<sup>1</sup> There are no South Carolina statutes to guide persons as to when they have or have not entered a common-law marriage. Petitioner is a grandmother who, the record reflects, held herself out as an unmarried person consistently in all business and personal affairs, except at her church and, on occasion, to one son-in-law, who was divorced by her daughter before the son-in-law asked the Department of Labor to investigate Petitioner. See Petition, 3-4.

the existence of a common-law marriage, is a question of law.<sup>2</sup> Cf. *Jackson v. Virginia*, 443 U.S. 307 (1979).

The government concedes that, at best, "the evidence regarding Petitioner's marital status . . . was borderline . . ." (Opposition, 6). The government has emphasized throughout that Petitioner's marital status is a matter peculiarly defined by state law, so that she can be prosecuted based upon a common-law marriage valid in South Carolina, even though most states no longer recognize such marriages, Petition, 11a-12a. But only the South Carolina Supreme Court can determine reliably whether under South Carolina law the evidence in this case was sufficient to sustain a finding, based on proof beyond a reasonable doubt, that Petitioner's relationship to Coke Seay was a common-law marriage.

In sum, the government has strongly emphasized the role of peculiar state laws in defining Petitioner's marital status. The government has conceded that the evidence is "borderline." The interests of justice at least require that the highest court of the State be invited to determine whether the courts below have properly applied South Carolina law of common-law marriage as a predi-

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<sup>2</sup> A certified question might properly be framed in the following language:

"Was the evidence of record in this case, summarized in the attached statement of facts and set forth in the record herewith transmitted, sufficient for the jury to find that the existence of a common-law marriage, as defined by South Carolina law, had been proved beyond a reasonable doubt?"

The relevant evidence, assuming all of the government's evidence to be true, would constitute the "findings of fact." A stipulated statement of these facts could, in all probability, be agreed by the parties based on the summaries in the Petition, 3-4, and the Opposition, 3-4. Rule 46(4) of the South Carolina Supreme Court provides that the record, or any portion of it, may be filed together with the order certifying the question.

cate for convicting Petitioner of fraud and false statement.

**2. The decision below conflicts with the decisions of other Courts of Appeals.**

The government suggests that the decision below is consistent with prior decisions because in this case the jury could have found that the Petitioner understood the ambiguous question (Opposition, 10, n. 8). But the fundamental rationale of the decisions at issue is that "a person does not answer official questions at his peril," leaving a jury free to find that he actually understood it to mean what the government contends it meant. *United States v. Diogo*, 320 F.2d 898, 906, (2d Cir. 1963).

The fundamental ambiguity of the form Petitioner signed has been recognized by the Department of Labor, which is revising that form to refer expressly to common-law marriages (Opposition, 8, n. 5). Although changing that form may avoid repetition of these precise facts, the government does not, and cannot, dispute Petitioner's contention (Petition, 12, 30a-31a) that millions of Americans are potentially at risk if they can be jailed because a prosecutor and a jury believe that a claimant understood an ambiguous question on a government form to require a different answer from the answer stated.

Where there is a conflict between circuits, this Court has exercised its jurisdiction, even where some of the conflicting decisions are *within* a circuit. *Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977). This is not a pure "intracircuit" conflict: the leading conflicting decisions are from the Second and Eighth Circuits, whereas the decision below was from the Fourth Circuit. The fact that a prior panel of the Fourth Circuit adopted the prevailing standard in *United States v. Race*, 682 F.2d 1114, 1120 (4th Cir. 1980), and the majority of the divided panel below ignored that standard, does not destroy the conflict between this decision and the decisions

of other circuits.<sup>8</sup> Cf. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (intracircuit conflict).

**3. The concept of common-law marriage, existing "according to what we believe to be the law of God," is void for vagueness.**

Petitioner, and the dissenting panel member of the Court of Appeals, have argued that the instruction to the jury that South Carolina defines a common-law marriage "according to what we believe to be the law of God" (Petition, 14, 23a) rendered the concept void for vagueness. The government has not responded to this argument. Therefore, the government's argument that the jury found Petitioner "knew" she had entered a common-law marriage (Opposition, 10-11) is fundamentally flawed, because any such finding was inextricably entwined with the definition of a common-law marriage "according to what we believe to be the law of God."

#### **CONCLUSION**

The petition for writ of certiorari should be granted, or the petition should be held in abeyance while the South Carolina Supreme Court is invited to answer a certified question to determine whether Petitioner did enter a common-law marriage under South Carolina law.

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May 25, 1984

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<sup>8</sup> This Court's rules provide for considering review "When a federal court of appeals has rendered a decision in conflict with the decisions of another federal court of appeals on the same matter . . ." Rule 17(a). Such a conflict exists in this case.